Supreme Court, U.S.
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NO. 98-1210

In the Supreme Court of the United States

OCTOBER TERM 1998

DALE GUARINO
Petitioner

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and JAMES W. LeBLANC
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF ALL PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari correctly lists all parties to this proceeding.

The parent companies of Kaiser Aluminum & Chemical Corporation are: MAXXAM Group Holdings Inc., MAXXAM Inc., Federated Development Inc., Federated Development Company and Kaiser Aluminum Corporation.

Non-wholly owned subsidiaries of Kaiser Aluminum & Chemical Corporation are: AKW General Partner L.L.C., AKW L.P., Alpart Farms (Jamaica), Ltd., Alumina Partners of Jamaica, Anglesey Aluminum Limited, Anglesey Aluminum Construction Limited, Anglesey Aluminum Metal Limited, Delta Holdings, Inc., Kaiser LaRoche Hydrate Partners, Oakland City Center Hotel Company, Inc., Queensland Alumina Security Corporation, Bauxita Da Amazonia Limitada, Furukawa Kaiser Forged Products Company, Hopewell International Insurance Ltd., Kaiser Jamacia Bauxite Company, Mineracao do Jutai Limitada, Mineracao do Matapi Limitada, Mineracao do Prainha Limitada, Queensland Alumina Limited, Volta Aluminum Company Limited.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

DALE GUARINO

Petitioner

VERSUS

KAISER ALUMINUM & CHEMICAL CORPORATION
and JAMES W. LeBLANC

Respondents

* *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reasons for Denying the Writ

1. **Petitioner misstates and exaggerates the evidence offered to prove that an "intentional act" had been *committed by Respondent LeBlanc***

Petitioner's fundamental problem with this case lies not in a violation of the Fourteenth Amendment of the United States Constitution but in the fact that his evidence failed to support his case. Petitioner's Statement of the Case (page 1 of Petition for Writ) grossly overstates and exaggerates

the facts of this case. At trial, there was no evidence of a "heated argument over where an impact gun should be stored"; LeBlanc did not "angrily exclaim" anything and did not "forcibly grab the heavy impact gun off of Guarino's shoulder." There was no "violent battery". All of these phrases are figments of Petitioner's counsel's imagination without any basis in the evidence.[1] The only description of the so-called confrontation between Guarino and LeBlanc was Guarino's explanation that LeBlanc "took" the impact gun from him. (Appendix A) Mrs. Guarino also testified that her husband told her that LeBlanc "took" the impact gun from him. (Appendix B) There is no evidence of a violent battery or angry exclamations or a forcible grabbing by LeBlanc, and it was for this reason that Petitioner suffered a reversal of his case in the Louisiana Fifth Circuit Court of Appeal. It is not because the Louisiana Fifth Circuit changed the rules in the middle of the game; rather, it is because the Fifth Circuit correctly recognized the inadequacy of Petitioner's evidence.

2. The Louisiana Court of Appeal's opinion was consistent with the two latest cases on "intentional act" from *the Louisiana Supreme Court*

The essential legal question in this case in the Trial Court and in the Court of Appeal was whether Respondent LeBlanc had committed an "intentional act" as that term is used in Louisiana Revised Statutes 23:1032. (Appendix C) The two latest cases from the Louisiana Supreme Court in-

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[1] Every appellate brief filed by Petitioner in this matter has exaggerated the facts of the case. Respondents have repeatedly called these exaggerations to the attention of the appellate courts and have prevailed at every appellate level.

terpreting the phrase "intentional act" are *Caudle v. Betts,* 512 So.2d 389 (La. 1987) and *White v. Monsanto Company,* 585 So.2d 1205 (La. 1991) both of which are cited in the Court of Appeal opinion. It is simply inaccurate for Petitioner to argue that the Louisiana Fifth Circuit Court of Appeal ignored *Caudle* in its decision. On the contrary, the Court of Appeal cited and briefly described the facts of the *Caudle* case, and then said:

> "There was no question in the (Caudle) case that the tortfeasor intended to harm the plaintiff. . ."
>
> 712 So.2d 992.

The Court went on to say:

> "That is not the circumstance here. The evidence simply does not establish that LeBlanc intended any injury whatsoever. . .In these circumstances we can only conclude that no intentional tort was committed."
>
> 712 So.2d 992.

The Petition for Writ of Certiorari, page 6, misstates both the holding of *Caudle v. Betts,* 512 So.2d 389 (La. 1987) and the jury charge when it says that *Caudle* and the jury charge "specifically state that plaintiff need not prove any intent to harm but only an intent to commit a battery and resulting injury" (page 6, Petition for Writ of Certiorari). To the contrary, the key holding in *Caudle* is:

> "It is sufficient if the actor intends to inflict harm-

ful or offensive contact without the other's consent.

512 So.2d 391.

Furthermore, the jury charge required of Petitioner a more difficult burden of proof than he would have this Court believe. The jury charge stated, in part, : (Appendix D)

> Furthermore, an employer is liable for injuries suffered by its employee in the course of employment, only if those injuries were caused by an intentional act of the employer or of a fellow employee.
>
> It is not necessary for plaintiff to prove the defendant's intent was malicious, or that the defendant intended to inflict actual damage. *It is sufficient if plaintiff proves that the defendant intended to inflict harmful or offensive contact,* without plaintiff's consent, and that this contact resulted in harm to plaintiff. *The defendant is liable for the intentional use of force on another,* even if it results in consequences which were not intended or foreseen by the defendant.
>
> *Therefore, in this case if you find that the defendant, James W. LeBlanc, intentionally used force or violence* during the course and scope of his employment, then the defendant Kaiser Aluminum & Chemical Corporation, as LeBlanc's employer, is also liable for damages resulting from that contact.

> An intentional use of force or violence on another may be accomplished through some object held by or on the person of the victim.
>
> *Therefore, in order to recover for an injury in this case, Dale Guarino must prove by a preponderance of the evidence the following:*
>
> (1) *That James W. LeBlanc committed an intentional act against the plaintiff, Dale Guarino; that is, that he intentionally used force or violence on Dale Guarino* either directly or through some object on his person; . . . . . (Emphasis added)

There is no basis upon which Petitioner can reasonably argue that the Louisiana Fifth Circuit Court of Appeal acted in some unconstitutional way in deciding the case as it did. The Court was obviously cognizant of the *Caudle* decision and gave *Caudle* due consideration in its decision. The Court obviously felt that Petitioner had failed to prove that LeBlanc intended to inflict either a "harmful or offensive contact" on Guarino as *Caudle* requires. In so holding, the Court did not specifically quote that *Caudle* language but it arrived at the same result by saying that the "evidence simply does not establish that LeBlanc intended any injury whatsoever."- This holding is certainly consistent with the jury charge which imposed upon Petitioner the burden to prove that Respondent LeBlanc "intentionally used force or violence on (Petitioner) Dale Guarino."

3. **Petitioner failed to raise the constitutional issue either in his Petition for Rehearing to the Court of Appeal or in his writ application *to the Louisiana Supreme Court***

Petitioner's legal arguments in support of his writ application are fundamentally flawed and should be rejected on either of two separate grounds: (1) Petitioner failed to raise his due process argument in the lower courts, thereby depriving this Court of jurisdiction, and (2) Petitioner was not denied his 14th Amendment due process rights in any event.

Supreme Court rule 14 (g) (i) is rigorous in its requirement that Petitioner properly specify the stage in the proceedings below when the federal question sought to be reviewed first was raised. Petitioner fails to meet this requirement. Petitioner freely admits that he did not refer to the concept of "due process" or to the 14th Amendment at any time previously, either in his petition for Rehearing before the Louisiana Court of Appeal or upon writ application to the Louisiana Supreme Court. Instead, Petitioner purports to rely on his use of the term "fundamental fairness" as a substitute for this constitutional argument. While this Court on occasion has granted remand where a constitutional issue was plain upon a review of the record without having been specifically raised below, this is not such a case.

As recently noted by this Court in *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028 (1997) :

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed. 2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to, the state court that rendered the decision we have been asked to review.

117 S.Ct. at 1029.

And it is Petitioner's burden to show that the issue properly was presented in the lower court. Again quoting from *Adams:*

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotry Int'l, v. Rotary Club of Duarte,* 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed. 2d 474 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.,* by demonstrating that the state court had "a fair opportunity to address the federal question which is sought to be presented here," *Webb v. Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed. 2d 392 (1981).

117 S.Ct. at 1029. *Accord, Illinois v. Gates,* 462 U.S. 213, 217, 103 S.Ct. 2317, 2321 (1983) (containing discussion of "not pressed or passed on below" rule).

In *Adams,* petitioner specifically mentioned "due process" in their argument to the lower court, albeit in a different context than was presented to this Court. Moveover, the *Adams* respondents addressed the due process issue in their briefs below as well. Nonetheless, this Court held that petitioners failed to carry their burden of showing that the claim was properly presented in the lower court. Citing the important "interest of comity" and practical considerations relating to the court's capacity to decide such issues, the Court dismissed the writ as improvidently granted. 117 S.Ct. at 1031-32.

Those same interests of comity and practical considerations demand that petitioner's writ application be denied. Not only is use of the term "fundamental fairness" insufficient to connote Petitioner's recently confected due process argument, it is undisputed that neither the Louisiana Court of Appeal nor the Louisiana Supreme Court ruled on the constitutional question. Simply put, this is not one of the "rare exceptions" to the general rule against consideration of constitutional questions not pressed or passed on below.

4. ***Petitioner's due process rights were not violated***

Even if one assumes, however, that Petitioner properly raised his constitutional claim in the lower courts, it is clear that Petitioner's due process rights in no way were violated. Petitioner's argument relies principally upon *Saunders v. Shaw,* 244 U.S. 317, 37 S.Ct. 638 (1917), a case which Petitioner claims presents a situation "most analogous" to the instant action. *Saunders* is a 1917 opinion no more than a single page in length, which bears little resemblance to this case and, indeed, has been distinguished by subsequent decisions of this Court over the years.

In particular, *Saunders* involved a situation where a defendant objected to certain of plaintiffs' evidence, which objection was sustained by the trial court. Although a proffer was made by plaintiffs, defendant did not find it necessary to offer countervailing evidence. On rehearing, however, the appellate court ruled in favor of plaintiffs, taking into consideration the very evidence excluded by the trial court. This Court held that the appellate court erred in considering that

evidence without offering defendant an opportunity to present countervailing evidence of his own.

In this case, Petitioner at no time was denied the opportunity to offer whatever evidence he may have chosen to introduce and has not made clear what evidence he would have introduced that would have made any difference.[2] Nor was the appellate court's decision in any way influenced by evidence not properly before the trial court. Indeed, these facts are much more akin to those in *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887 (1974), than in *Saunders*. As stated in *Hamling*:

> The sequence of events in this case is quite different from that in *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), upon which our Brother Brennan relies. There the Supreme Court of Louisiana directed the entry of judgment against the intervening defendant who had prevailed in the trial court, on the basis of testimony adduced merely as an offer of proof by the plaintiff, and to which the intervening defendant had therefore had no occasion to respond. Since the trial court had ruled that the issue to which plaintiffs' proof was addressed was irrelevant, this Court reversed the Supreme Court of Louisiana in order that the intervening defendant might have an oportunity to controvert the plaintiff's proof. Here petitioners were given full latitude in rebutting every factual issue dealt with

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[2] The jury charges were not given by the trial judge to either counsel until after the close of evidence so it is not credible that Petitioner would have changed his presentation of evidence to conform to a different jury charge.

> in the Government's case, and no claim is made that the jury was permitted to rely on evidence introduced merely by way of offer of proof which was not subject to cross-examination or to contradiction by countervailing evidence offered by the petitioners. The present case seems to us much closer to *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966), than to *Saunders.*

418 U.S. at 110 n.11, 94 S.Ct. at 2904 n.11. *See Butler Bros. v. McColgan*, 315 U.S. 501, 510, 62 S.Ct. 701, 705 (1942) (*Saunders v. Shaw* inapplicable where appellant had full opportunity to be heard on issues tendered).

In short, Petitioner never was deprived of the opportunity to present his evidence as occurred in *Saunders v. Shaw.* Petitioner was free to offer whatever evidence he chose in support of his claim and did so. Petitioner's problem is not that he was denied the right to offer relevant evidence but that he failed to offer evidence sufficient to support his claim.

CONCLUSION

Petitioner's writ application is based on exaggerated statements about the quality of his evidence. The Court of Appeal, fully cognizant of Louisiana law, recognized the inadequacies of petitioner's evidence and reversed the trial judgment in his favor. The Court of Appeal did so in a manner consistent with applicable Louisiana law and the jury charges. Petitioner was never denied the opportunity to present evidence and, moreover, has failed to preserve his right to make a constitutional argument at this level by failing to raise that argument in the previous two appellate levels.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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APPENDIX A

EXCERPTS OF TESTIMONY OF DALE GUARINO

Q You didn't have the coil wrapped around your arm?

A No.

Q Or your shoulder?

A No.

Q It was just resting there?

A It was resting on the finger or whatever.

Q Was it attached in anyway to your body or to your clothing?

A I would not think so.

Q You didn't have any kind of a strap or a pen or anything like that holding it there?

A No.

Q And if you had just taken your hand off or let you hand go, it would have fallen off your shoulder?

A It may have fell on my shoulder if I let it go.

Q I mean if you had let it go, it would have fallen off. There was nothing to hold it there other than your hand.

A It would have fell and maybe hit me is what I'm trying to say. It might have fell on my shoulder or my head.

Q Well, I'm not suggesting that you did let it go. I'm just asking you what would have happened if you had let it go, it would have fallen.

A It would have fallen, but it might have hit my body on its way down is what I am trying to say.

Q Now, your testimony is that Jimmy LeBlanc removed the gun, the impact wrench from your shoulder?

A Yes, without a doubt.

Q And you can't really say how he did it or what happened?

A I wasn't facing the man. I didn't see him coming. He hit me blind sided.

Q So you don't really know how he did it?

A All I know is the wrench was on my shoulder and then it wasn't on my shoulder.

Q And it just happened that fast?

A Right. It was fast action.

Q Did you fall down?

A No.

Q Did you get pulled back into the locker?

A I don't recall getting pulled back. I don't know.

Q Did you get jerked on one side or the other?

A Not that I recall. I don't know. It was a fast action.

Q You don't really know what happened to your body in this incident, do you?

A I know the impact wrench was on me and then it wasn't on me.

Q Suddenly it was gone.

A Yes.

Q And you can't explain it any better than that.

A Well, milliseconds after it happened Jimmy had the wrench in his hand, and I told him don't ever do that again, and he said I should have let it go. So that showed me that he took it from me. And there was no one else present.

Q How did it happen that by pulling this gun out of your hand or removing this gun from your hand that there was an injury caused to your shoulder? Can you explain that?

MR. MUSTIAN: Your Honor, may we approach?

THE COURT: Yes.

(OFF THE RECORD DISCUSSION)

BY MR. HANEMANN:

Q What I asked you was how did it happen that by removing this gun out of your hand that there was an injury caused to your shoulder? Can you explain that?

A When you carry a heavy object in your hand and balance it like I was doing that particular day, your hand becomes in a lock mode. And if someone tries to pull something — he didn't tell my hand to let it go. My hand didn't know to let it go probably.

Q Your hand didn't what?

A My hand probably didn't know to let it go, it happened so fast. When you carry a 12-pound object in your hand, your hand has got a lot of strength on this object to keep it from falling. And in a split second someone takes something away from you and your hand doesn't know to let it go, it's going to hang on to it for that split second or whatever it would take.

Q Mr. Guarino, the truth is that you don't know what the answer to that question is, and you can't explain how it caused an injury to you, can you?

A The truth is when you carry a 12 pound object, you hold it tight in your hand, a tight grip. And that is exactly what I was doing when this happened. If not I would have got hit in the head. The impact wrench, Like you said, would have fell over. It would have hit me in my head or fell on the

ground.

Q Do you remember that I took your deposition in this case?

A Yes, I remember you taking depositions.

Q And I took your deposition on March 25, 1996. That is less than a year ago.

A Probably so.

MR. HANEMANN: And I'm referring, Counsel, to Page 31, Line 1.

BY MR. HANEMANN:

Q And I'm going to read the question that I asked you at that time.

A Can I see the deposition, if you don't mind?

Q Sure. I'll be glad to show it to you. Well, I stand here and read it with you.

A QUESTION: "How did it happen that by pulling this gun out of your hand that there was an injury caused to your shoulder? Can you explain that? And your answer was: "I don't know how. I can't explain how that caused the injury." Did I read that correctly?

A Right.

Q And was that your testimony at that time, Mr. Guarino?

Q Yes, that was my testimony, I'm telling you right now I don't know how it could cause injury. What I'm telling you is when you carry a heavy object in your hand, you are going to hold on to it tight.

Q Did LeBlanc grab any part of your body?

A No.

Q So the only thing he touched, as far as you know, is the impact wrench itself?

A As far as I know, that is all he touched. It was a real quick sudden jerk movement, whatever it was I don't know. It was quick whatever happened.

APPENDIX B

EXCERPTS OF TESTIMONY OF MRS. GUARINO

Q Do remember that day?

A Yes, I do.

Q Tell us what you remember about that day or that night.

A Well, when he came home, I could see something was wrong. I asked him what happened, what's the matter. And he told me what happened. You want me to tell you what happened, what he told me happened?

Q Tell us what he told you.

A He said he was putting something in his locker, he told me a wrench. I know now it's called an impact wrench. And this guy named Jimmy told him that it was his and that he wanted it. And I don't remember what Dale told him or what happened. And that he took it out of his hands. That is all I remember.

EXAMINATION BY MR. HANEMANN:

Q Mr. Guarino, it is your understanding of what Dale told you when he got home that day that Jimmy LeBlanc took something out of his hand?

A Yes.

Q That is what you just testified?

A Yes.

APPENDIX C

LOUISIANA REVISED STATUTE 23 : 1032

§1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

A. The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury or compensable sickness or disease. For purposes of this Section, the work "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution there-of. This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

B. Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

C. The immunity from civil liability provided this Section shall not extend to: (1) any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and (2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

* * *

APPENDIX D

EXCERPT OF JURY CHARGE GIVEN IN TRIAL COURT

Furthermore, an employer is liable for injuries suffered by its employee in the course of employment, only if those injuries were caused by an intentional act of the employer or of a fellow employee.

It is not necessary for plaintiff to prove the defendant's intent was malicious, or that the defendant intended to inflict actual damage. It is sufficient if plaintiff proves that the defendant intended to inflict harmful or offensive contact, without plaintiff's consent, and that this contact resulted in harm to plaintiff. The defendant is liable for the intentional use of force on another, even if it results in consequences which were not intended or foreseen by the defendant.

Therefore, in this case if you find that the defendant, JAMES W. LEBLANC, intentionally used force or violence during the course and scope of his employment, then the defendant, KAISER ALUMINUM & CHEMICAL CORPORATION, as LEBLANC's employer, is also liable for damages resulting from that contact.

An intentional use of force or violence on another may be accomplished through some object held by or on the person of the victim.

Therefore, in order to recover for an injury in this case, DALE GUARINO must prove by a preponderance of the evidence the following:

(1) That JAMES W. LEBLANC committed an intentional act against the plaintiff, DALE GUARINO; that is, that he intentionaly used force or violence on DALE GUARINO, either directly or through some object on his person;

APPENDIX E

OPINION OF LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

DALE GUARINO	NO. 97-CA-926
VERSUS	COURT OF APPEAL
KAISER ALUMINUM & CHEMICAL & JAMES LEBLANC	FIFTH CIRCUIT STATE OF LOUISIANA

APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JAMES, NO. 23310, DIVISION "A", HONORABLE GLYNN LONG, JUDGE

: : :

EDWARD A. DUFRESNE, JR.
JUDGE

MAY 13, 1998

: : :

(Panel composed of Judges Charles Grisbaum, Jr., Edward A. Dufresne, Jr., Thomas C. Wicker, Jr., James L. Cannella and Thomas F. Daley)

CANNELLA, J., DISSENTS

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JUDGMENT VACATED,
MATTER DISMISSED.

This is an appeal by Kaiser Aluminum & Chemical Corporation and James LeBlanc, defendants-appellants, from a $300,000.00 jury verdict in a suit by Dale Guarino, a Kaiser employee. Guarino claimed to have been injured on the job by an intentional act on the part of LeBlanc, his temporary shift foreman, thus permitting him to assert a tort action as per La. R.S. 23:1032. Because we determine that the evidence presented, even when taken in a light most favorable to plaintiff, does not establish as a matter of law that an intentional tort was committed, we must set aside the judgment.

The appellants submit here that they do not challenge plaintiff's version of the basic facts of the incident giving rise to this litigation. Instead, they contend that even taking those facts to be true plaintiff has not established an intentional tort. We thus proceed with those propositions in mind.

Dale Guarino is an employee of Kaiser Aluminum at its refining plant in St. James Parish. On the day in question, his regular shift foreman, Raymond Gros, had been temporarily replaced by James LeBlanc. At the end of his shift, Guarino returned to the tool locker area with an impact wrench, a twelve to eighteen pound hand tool, with an air hose attached to it. As he was standing in front of one of the lockers, LeBlanc approached him and asked for the wrench, apparently believing that it was his. Guarino refused to hand over the tool, even though it did have LeBlanc's name on it. He explained to LeBlanc that Gros, the regular foreman, had given his crew specific instructions to return all tools used on their shift to their shift's designated tool locker. Guarino testified that he was holding the tool in his hand, which was in turn just above his shoulder, with the hose dangling off of an outstretched finger. At that point, LeBlanc said

"F--- Raymond Gros," and grabbed the tool out of Guarino's hand. Guarino contended that the action was so quick that he did not have time to release his grip on the tool and that his arm was twisted as LeBlanc pulled it away. This in turn resulted in an injury to his rotor cuff which eventually required surgery to repair.

Guarino gave the most detailed explanation of the incident on cross-examination, as follows:

Q. And when you were demonstrating earlier how you were carrying this wrench, it was my impression that you had it kind of propped up on your shoulder.

A. Yes.

Q. Holding it in your hand.

A. More or less balancing it with my hand.

Q. All right. So you were kind of balancing it up on the shoulder, and you had both the coil and the wrench itself up on your shoulder?

A. I had the hose coiled around one of my fingers sticking out.

Q. You didn't have the coil wrapped around your arm?

A. No.

Q. Or your shoulder?

A. No.

Q. It was just resting there?

A. It was resting on the finger or whatever.

Q. Was it attached in any way to your body or to your clothing?

A. I would not think so.

Q. You didn't have any kind of strap or a pen [sic.] or anything like that holding it there?

A. No.

Q. Now, your testimony is that Jimmy LeBlanc removed the gun, the impact wrench from your shoulder?

A. Yes, without a doubt.

Q. And you can't really say how he did it or what happened?

A. I wasn't facing the man. I didn't see him coming. He hit me blind sided.

Q. So you don't really know how he did it?

A. All I know is the wrench was on my shoulder and then it wasn't on my shoulder.

Q. And it just happened that fast?

A. Right, it was a fast action.

Q. Did you fall down?

A. No.

Q. Did you get pulled back into the locker?

A. I don't recall getting pulled back. I don't know.

Q. Did you get jerked on one side or the other?

A. Not that I recall. I don't know. It was a fast action.

Q. You don't really know what happened to your body in this incident, do you?

A. I know the impact wrench was on me and then it wasn't on me.

Q. Suddenly it was gone.

A. Yes.

Q. And you can't explain it better than that.

A. Well, milliseconds after it happened Jimmy had the wrench in his hand, and I told him don't ever do that again, and he said I should have let it go. So that showed me that he took it from me. And there was no one else present.

Q. Did LeBlanc grab any part of your body?

A. No.

Q. So the only thing he touched, as far as you know, is the impact wrench itself)

A. As far as I know, that is all he touched. It was a real quick sudden jerk movement, whatever it was I don't know. It was quick whatever happened.

As urged by the defendants, we accept Guarino's version of the incident as presented in this testimony. The question, then, is whether this evidence is sufficient to established commission of an intentional tort by LeBlanc.

In *White v. Monsanto Co.*, 585 So.2d 1205, 1208 (La. 1991), the court set forth the law concerning "intentional acts" in the workers' compensation context, as follows:

> LSA-R.S. 23:1032 makes worker's compensation an employee's exclusive remedy for a work-related injury caused by a co-employee, except for a suit based on an intentional act. The words "intentional act" mean the same as "intentional tort." The legislative aim was to make use of the well-established division between intentional torts and negligence in common law. The meaning of intent is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result. Thus, intent has reference to the consequences of an act rather than to the act itself. Only where the actor entertained a desire to bring about the consequences that followed or where the actor believed that the result was substantially certain to follow has an act been characterized as intentional. *Bazely v. Tortorich, 397 So.2d 475 (La. 1981).*

We further note that the "subtantially certain" language has reference to what a reasonable man in a defendant's position would believe. W. Prosser, Law of Torts, § 8 (4th ed. 1971).

In the case before us, there is no evidence to suggest, much less to establish by a preponderance of the evidence, that LeBlanc actually intended to injure Guarino. Further, a reasonable man would not have believed that grabbing a tool out of someone's hand would be substantially certain to cause injury. Thus, neither prong of the intentional tort analysis has been met in this case. That being so, Guarino's sole remedy under La. R.S. 23:1032, lies in workers' compensation.

Guarino cites *Caudle v. Betts, 512 So.2d 389 (La. 1987)* in support of his argument that an intentional tort was committed by LeBlanc. We find that case factually dissimilar, however. There, the president of a corporation shocked an employee on the neck with an automobile condenser, and caused severe nerve injury. The defense asserted that because the tortfeasor did not intend to cause an injury of the severity that actually resulted, no intentional tort had been committed. There was no question in the case that the tortfeasor intended to harm the plaintiff, and although he may not have intended to harm his so badly, a tortfeasor nonetheless takes his victim as he finds him.

That is not the circumstance here. The evidence simply does not establish that LeBlanc intended any injury whatsoever, and further, a reasonable man would not have anticipated that any injury would result from the act. In these circumstances we can only conclude that no intentional tort was committed.

For the foregoing reasons, we vacate the judgment of the district court in plaintiffs favor, and dismiss the matter.

JUDGMENT VACATED,
MATTER DISMISSED.

DALE GUARINO	FIFTH CIRCUIT
VERSUS	COURT OF APPEAL
KAISER ALUMINUM & CHEMICAL & JAMES LEBLANC	STATE OF LOUISIANA
	NO. 97-CA-926

CANNELLA, J., DISSENTS.

I would affirm the jury verdict in this case for the following reasons.

When an employee seeks to recover from his employer for an intentional tort, a court must apply the legal precepts of general tort law related to the particular intentional tort alleged, in order to determine whether he has proved his cause of action and the damages recoverable thereunder. *Caudle v. Betts,* 512 So.2d 389, 391 (La.1987); *Stewart v. Parish of Jefferson,* 95-407 (La. App. 5th Cir. 1/30/96), 668 So.2d 1292, 1294.

In *Caudle v. Betts,* 512 So.2d 389 (La. 1987), the Louisiana Supreme Court held that a battery was an intentional tort for purposes of the workers compensation act. There, the court found that an intentional battery had occurred when plaintiff's employer's principal owner and chief executive officer intentionally touched and shocked the plaintiff with an auto condenser as a practical joke. The court stated:

A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact, is a battery... The intention need not be malicious nor need it be an intention to inflict actual damage. It is sufficient if the actor intends to inflict either a harmful or offensive contact without the other's consent. (Citations omitted)

The original purpose of the courts in providing the action for battery undoubtedly was to keep the peace by affording a substitute for private retribution. F. Stone, *Louisiana Civil Law Treatise. Tort Doctrine.* § 125 (1977). The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contacts that do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting. W. Prosser and W. Keeton, *The Law of Torts,* § 9 (5th ed. 1984); *Harrigan v. Rosich,* 173 So.2d 880 (La. App. 4th Cir. 1965).

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm... Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good. (Citations omitted)

Bodily harm is generally considered to be any physical impairment of the condition of a person's

body, or physical pain or illness... The defendant's liability for the resulting harm extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim. (Citations omitted)

Caudle v. Betts, 512 So.2d at 391-392..

Likewise, in *Villa v. Derouen,* 614 So.2d 714 (La. App. 3 Cir. 1993), a co-employee pointed a welding cutting torch in plaintiff's direction and intentionally released oxygen or acetylene gas that caused unintentional harm to plaintiff in the form of burns to his groin area. In that case, the Third Circuit stated that to constitute a battery, defendant need only intend that the oxygen be sprayed toward the plaintiff come into contact with him or that he have knowledge that this contact was substantially certain to occur.

The *Caudle* case is the authority for the facts in this case. This was a intentional battery. Under *Caudle,* the jury did not err in finding that the intentional tort exclusion to the worker's compensation act applies. Thus, I would affirm that portion of the judgment. I would reduce the damages.

APPENDIX F

REHEARING DENIED BY LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

COURT OF APPEAL, FIFTH CIRCUIT STATE OF LOUISIANA

Clerk's Office, Gretna June 17 1998

DEAR SIR

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

Dale Guarino v. Kaiser Alum & Chem./LeBlanc

No. 97 CA 926

Very truly yours,

PETER J. FITZGERALD, JR. Clerk

APPENDIX G

WRIT DENIED BY LOUISIANA SUPREME COURT

THE SUPREME COURT OF THE STATE OF LOUISIANA

DALE GUARINO

VS. NO. 98-C - 1893

KAISER ALUMINUM & CHEMICAL
& JAMES LEBLANC

IN RE: Guarino, Dale; - Plaintiff(s); Applying for Writ of Certiorari and /or Review; to the Court of Appeal, Fifth Circuit, Number 97-CA-0926; Parish of St. James 23rd Judicial District Court Div. "A" Number 23,310

October 30, 1998

Denied.

JPV

WFM

CDK

BJJ

CDT

JTK

CALOGERO, C.J. would grant the writ.

LEMMON, J. not on panel.

Supreme Court of Louisiana
October 30, 1998

/s/ Illegible

Clerk of Court
For the Court